SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 73664 / November 21, 2014

Admin. Proc. File No. 3-15794

In the Matter of the Application of

MITCHELL T. TOLAND
c/o Brad S. Maistrow, Esq.
17 Battery Place, Suite 711
New York, NY 10004

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DENIAL OF MEMBERSHIP CONTINUANCE APPLICATION

Registered securities association denied member's application to permit continued association of an individual who was subject to a statutory disqualification because of his willful failure to disclose his 2005 bankruptcy filing. *Held*, review proceeding is *dismissed*.

APPEARANCES:

Brad S. Maistrow for Mitchell T. Toland.

Alan Lawhead and *Andrew J. Love* for Financial Industry Regulatory Authority, Inc.

Appeal filed: March 12, 2014
Last brief received: June 19, 2014

Mitchell T. Toland, an individual subject to statutory disqualification from association with a member firm, appeals from the decision by the Financial Industry Regulatory Authority, Inc. ("FINRA") denying the application of his former employer, Hallmark Investments, Inc. ("Hallmark"), to remain a FINRA member notwithstanding its employment of Toland as a

general securities representative.[1] Toland is subject to statutory disqualification because he willfully failed to disclose his 2005 bankruptcy filing on his Uniform Application for Securities Industry Registration or Transfer ("Form U4"). Toland asserts that FINRA abused its discretion in denying his request to postpone the hearing on Hallmark's application, which he subsequently declined to attend, and requests that we remand this matter for a hearing. For the reasons explained below, we dismiss Toland's application for review.[2] We base our findings on an independent review of the record.

I. Background

A. Toland became subject to statutory disqualification when FINRA found in a September 2009 settled order that he willfully failed to disclose his 2005 bankruptcy filing on his Form U4.

In a September 22, 2009 settled order, FINRA found that Toland willfully failed to disclose his 2005 bankruptcy filing on his Form U4.[3] Persons associated with brokers are required to update their Forms U4 with certain information,[4] including whether the person filed for bankruptcy within the last ten years or is subject to any unsatisfied liens or judgments.[5] FINRA and other SROs use this important information in assessing the fitness of associated persons,[6] and "[t]he duty to provide accurate information and to amend the Form U4 to provide current information assures" that interested parties "have all material, current information about

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1 *In the Matter of the Continued Ass'n of Mitchell T. Toland as a Gen. Sec. Rep. with Hallmarks Invs., Inc.*, SD-1812 (Feb. 19, 2014), *available at* http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p448164.pdf.

2 Commission precedent allows Toland to appeal FINRA's decision denying Hallmark's application. *Timothy P. Pedregon, Jr.*, Securities Exchange Act Release No. 61791, 2010 WL 1143089 (Mar. 26, 2010) (considering associated individual's appeal of FINRA decision denying firm's membership continuance application); *see also Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 WL 2887272, at *1 n.5 (June 26, 2014) (concluding that person subject to statutory disqualification was a "person[] aggrieved by FINRA's denial" of his employer's membership continuance application).

3 *Dep't of Enf. v. Mitchell T. Toland*, Discip. Proceeding No. 20070099785-02 (Sept. 22, 2009).

4 *See* FINRA By-Laws, Article V, Section 2(c) (requiring that every Form U4 be kept current at all times through supplementary amendments filed within thirty days of learning of the facts or circumstances giving rise to the amendment).

5 Form U4 question 14K(1) asks, among other things, whether the associated person has filed a bankruptcy petition in the past ten years. Question 14M asks whether the person has any unsatisfied liens or judgments against him.

6 *See Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 WL 2138439, at *5 (July 17, 2009) (citing *Thomas R. Alton*, Exchange Act Release No. 36058, 52 SEC 380, 1995 WL 464801, at *2 (Aug. 4, 1995), *aff'd*, 105 F.3d 664 (9th Cir. 1996) (Table)).

the securities professional with whom they are dealing."[7] Toland's willful omission of his bankruptcy in the Form U4 made him subject to statutory disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934,[8] and, as a result, disqualification under FINRA's By-Laws.[9] Pursuant to the parties' settlement, FINRA suspended Toland in all capacities for forty-five days and fined him $5,000.[10]

B. Hallmark submitted a membership continuance application seeking to continue its association with Toland and then sought postponement of the first hearing date on the application.

On December 2, 2009, Hallmark submitted an MC-400 Membership Continuance Application to FINRA's Department of Registration and Disclosure seeking to permit Toland, who had been associated with Hallmark since 2005, to continue to associate with the firm as a general securities representative, although he was subject to statutory disqualification. "[A] person subject to statutory disqualification cannot become or remain associated with a FINRA member firm unless the person's member firm applies for, and is granted, in FINRA's discretion, relief from the statutory disqualification."[11] Nonetheless, FINRA permits certain individuals subject to statutory disqualification to continue to associate with their employers pending resolution of the employers' membership continuance applications.[12] Toland continued to work for Hallmark while its application was pending.

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7 *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 WL 5001956, at *6 (Oct. 20, 2011).

8 *See* 15 U.S.C. § 78c(a)(39) (providing that a person is subject to statutory disqualification if he willfully has made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization).

9 FINRA By-Laws, Art. III, § 4 (stating that a person is subject to "disqualification" if such person is subject to "statutory disqualification" as defined in Exchange Act Section 3(a)(39)).

10 In an investigative interview preceding the settlement, Toland acknowledged his error and expressed remorse for his omission, which he characterized as inadvertent.

11 *Savva*, 2014 WL 2887272, at *2 (citing FINRA By-Laws, Art. III, § 3(b), (d); *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at *1 n.4 (Apr. 18, 2013), *petition for review pending* No. 13-1252 (D.C. Cir. filed Sept. 9, 2013)).

12 Statutory Disqualification Process, http://www.finra.org/Industry/Enforcement/Adjudication/NAC/StatutoryDisqualificationProcess/index.htm (last visited Nov. 20, 2014) (stating that, notwithstanding the general rule that "a person who is subject to disqualification may not associate with a FINRA member in any capacity unless and until approved in an Eligibility Proceeding," "[i]f a person is currently associated with a FINRA member at the time the disqualifying event occurs, . . . the person may be permitted to continue to work in certain circumstances, provided the employer member promptly files a written application seeking permission to continue the employment in an Eligibility Proceeding" (emphasis omitted)).

FINRA initially scheduled a November 10, 2011 hearing on Hallmark's application before a subcommittee ("Hearing Panel") of FINRA's Statutory Disqualification Committee. But the individual the firm designated in its application to serve as a backup supervisor for Toland received a "Wells notice,"[13] so Hallmark and Toland sought a postponement of the hearing to allow time to find a new backup supervisor. FINRA Member Regulation did not oppose the request and the hearing was adjourned without setting a new date for consideration of the application.[14]

C. FINRA set a new hearing date after learning that Toland had failed to disclose additional required information.

FINRA Member Regulation asserts that it became aware in February 2013 that Toland had failed to disclose additional required information in his Form U4 – eight outstanding judgments and liens totaling more than $490,000.[15] Two liens predated Toland's settlement with FINRA but Toland did not disclose them to FINRA at the time, and the settlement did not address them. The remainder of the liens and judgments arose after the settlement of Toland's willful failure to disclose his bankruptcy filing.

Member Regulation's discovery led to new urgency in the scheduling of the hearing on Hallmark's application. FINRA initially set a June 5, 2013 hearing, but Toland's counsel had a previously scheduled court appearance on that date. The parties agreed to hold the hearing on August 15, 2013, which FINRA memorialized in a May 15, 2013 scheduling order.

D. Toland requested two additional postponements of the hearing date.

On July 22, 2013, Toland moved to postpone the August 15 hearing date based on his counsel's unavailability. Member Regulation objected, expressing skepticism for the need to

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[13] A Wells notice is a communication from a regulator or self-regulatory organization, such as the Commission or FINRA, that it intends to recommend bringing an enforcement or disciplinary action against the recipient.

[14] Toland asserts that FINRA failed to schedule a hearing for an agreed April 19, 2012 date. At that time, however, Toland's proposed backup supervisor had yet to qualify as a supervisor. The proposed backup qualified as a supervisor in January 2013.

[15] These judgments and liens consisted of: (1) a $28,004 New Jersey tax lien filed in January 2008; (2) a $15,965 New York tax warrant filed in December 2008; (3) a $10,140 New York tax warrant filed in September 2010; (4) a $731 New York tax warrant filed in November 2010; (5) a $22,951 judgment obtained by Columbia Grammar & Preparatory School in February 2011; (6) a $614 judgment obtained by Midland Funding LLC in July 2011; (7) four federal tax liens totaling $386,838 (addressing tax years 2003 through 2010) that were consolidated into a single lien filed in May 2012; and (8) a $25,000 federal tax lien filed in June 2012 (for tax year 2011).

postpone the previously agreed date.[16] Nonetheless, on August 5, 2013, FINRA granted Toland's motion and ordered that the hearing be held on October 17, 2013 at 12:30 p.m. at FINRA's Washington, D.C., headquarters. FINRA also directed the parties to complete their exchange of exhibits and witness lists by October 3, 2013.

On October 2, 2013, Toland sought an "emergency postponement" of the hearing date based on his mother's medical condition. Toland asserted that his mother recently had been diagnosed with an advanced stage of cancer, that he lived with her and was her sole caretaker, and that there were "no relatives or friends who [we]re able to take Mrs. Toland to and from her treatments and attend to her needs" after she received chemotherapy, which he expected would begin the following week. As such, Toland maintained that he could not attend the October 17 hearing. He did not propose an alternative hearing date.

On October 3, 2013, FINRA Member Regulation opposed Toland's postponement request but offered to change the location of the hearing to either FINRA's New York or New Jersey district office to accommodate Hallmark, Toland, and his counsel. Member Regulation also stated that it expected the hearing would run no more than two and a half hours, and FINRA later advised Toland that it anticipated he would need to be present for only approximately one hour of the hearing. On October 4, 2013, FINRA advised the parties that, although the Hearing Panel had denied Toland's postponement request, it would move the hearing to New York to accommodate him.

E. Neither Toland, his counsel, nor anyone representing Hallmark attended the telephonic hearing on Hallmark's application.

On October 15, 2013, Toland advised FINRA by letter that he would not attend the hearing on October 17 because his mother had a medical appointment scheduled for the same day. Toland asserted that, although the hearing had been moved to New York, this was insufficient to accommodate him because no one else "could bring his mother for treatment" and "attend to her while she suffered through the debilitating side effects thereof." FINRA thereafter informed the parties that the hearing would be held telephonically and provided them access information for the call.

On October 17, 2013, the Hearing Panel held a hearing on Hallmark's application. Neither Toland, his counsel, nor anyone representing or affiliated with Hallmark joined the teleconference, although only Toland asserted he was unavailable. Hallmark never submitted a witness list or any proposed exhibits in support of its application.

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[16] Member Regulation argued that, although Toland sought a postponement to allow his counsel to drive his daughter back to Ann Arbor, Michigan for her senior year of college, Toland's counsel represented that those travels would occur in the last week of August when he agreed to the August 15, 2013 hearing. In addition, Member Regulation asserted that it was "telling" that Toland sought the adjournment a little more than a week before final document exchange was due and "curious" that the extension was filed shortly after Member Regulation had outlined to Toland its argument for recommending denial of Hallmark's application.

F. FINRA's National Adjudicatory Council denied Hallmark's application.

After the hearing, the Hearing Panel submitted its written recommendation on Hallmark's application to FINRA's Statutory Disqualification Committee. On February 19, 2014, after the Committee presented a written recommendation to FINRA's National Adjudicatory Council, the NAC issued a seventeen-page decision denying Hallmark's application because "Toland's continued association with the Firm would create an unreasonable risk of harm to the market or investors."[17]

In so concluding, the NAC applied the framework set forth in *Paul Edward Van Dusen* and subsequent Commission opinions, applicable where the misconduct making an individual subject to statutory disqualification was previously the subject of a Commission or SRO sanction of specified duration.[18] In such an instance, an SRO "ordinarily" may not deny relief "based solely on the underlying misconduct that led to the statutory disqualification" and completed sanction; rather, "something more is needed."[19] In that respect, an SRO should "generally confine its analysis to new information,"[20] such as "[1] misconduct in which a statutorily disqualified person may have engaged since the misconduct that gave rise to the statutory disqualification, [2] the nature and disciplinary history of a prospective employer, and [3] the proposed supervisory structure to which the statutorily disqualified person would be subject."[21] In rejecting Hallmark's application, the NAC relied on each of these three factors.

First, the NAC observed that "Toland engaged in serious intervening misconduct, which is identical to the misconduct underlying the disqualifying settlement order." The NAC was

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[17] Unlike a disciplinary hearing, the process for consideration of a membership continuance application does not involve the publication of a hearing panel decision appealable to the NAC. The NAC issued the sole written decision on Hallmark's application following the hearing.

[18] Exchange Act Release 18284, 47 SEC 668, 1981 WL 315505, at *3 (Nov. 24, 1981) (setting forth framework in case where statutory disqualification arose from conduct addressed by Commission's eighteen-month conditional bar order); *Reuben D. Peters*, Exchange Act Release No. 49819, 57 SEC 657, 2004 WL 1351269, at *4-5 (June 7, 2004) (finding framework applicable where disqualification arose from permanent injunction entered for conduct also addressed by two-month Commission administrative suspension); *May Capital Group, LLC*, Exchange Act Release No. 53796, 2006 WL 1312955, at *5 (May 12, 2006) (clarifying that *Van Dusen* analysis applies where completed sanction was imposed by SRO).

[19] *Harry M. Richardson*, Exchange Act Release No. 51236, 58 SEC 134, 2005 WL 424920, at *3 (Feb. 22, 2005); *see also Arouh*, 2010 WL 3554584, at *12 ("[W]here a statutorily disqualified person has applied for permission to associate after a sanction of specified duration has run its course, we have held that it would be inconsistent with the remedial purposes of the Exchange Act and unfair to deny the application solely on the basis of the misconduct that led to the original sanction." (citing *Van Dusen*, 1981 WL 315505, at *3)).

[20] *Arthur H. Ross*, Exchange Act Release No. 30956, 50 SEC 1082, 1992 WL 188932, at *2 (July 27, 1992).

[21] *Richardson*, 2005 WL 424920, at *2 (citing *Van Dusen*, 1981 WL 315505, at *3).

"troubled and perplexed by Toland's repeated and continuing failures to disclose judgments and liens on his Form U4," particularly given the remorse he previously expressed for failing to disclose his 2005 bankruptcy filing. The NAC found that Toland's misconduct deprived customers and the investing public of material information concerning his financial difficulties and ability to manage his financial obligations. The NAC concluded that Toland's failures were inexcusable and raised serious doubts that he was able, or willing, to comply with securities rules and regulations.[22] Thus, even without considering the circumstances that subjected Toland to statutory disqualification (the failure to disclose his 2005 bankruptcy), the NAC determined that Toland's recent failures to disclose judgments and liens were, on their own, sufficiently egregious to deny Hallmark's application.[23]

Second, the NAC found that Hallmark "ha[d] a troubling disciplinary and regulatory history, particularly with respect to disclosure issues" and that the totality of that history was "disconcerting," supporting the conclusion that Hallmark was "not capable of assuming the additional heavy burden of supervising a statutorily disqualified individual such as Toland." The NAC concluded that, like Toland, Hallmark "has a troubling history of failing to comply with FINRA's reporting and disclosure obligations."[24] In addition, the NAC cited a number of additional events that cast substantial doubt on the quality of Hallmark's supervision.[25]

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[22] In addition, the NAC noted that, when Toland eventually updated his Form U4 in July 2013, he failed to include three New York tax warrants that Member Regulation identified for him at the time it informed him of his disclosure failures.

[23] The NAC also found that Toland's disclosure failures, including his failure to disclose his 2005 bankruptcy, demonstrated a pattern of misconduct, but did not rely on it in denying the application.

[24] The NAC cited events including the following: (1) in February 2009, Hallmark and its owner settled a FINRA action related to a misleading and inaccurate application to change the firm's ownership; (2) in February 2010, FINRA issued a Cautionary Action that cited Hallmark for, among other things, failing to update the firm's Form BD to reflect that its owner had been suspended; and (3) a FINRA Cautionary Action cited Hallmark for failing to timely file Form U4 amendments, including with respect to Toland's disclosure of the 2009 settlement order relating to his failure to disclose his 2005 bankruptcy. In addition, the NAC noted that neither Hallmark's Form BD nor its principal's Form U4 disclosed a 2013 Indiana consent agreement. Although Toland does not dispute this, these documents do not appear in the record, and we accordingly do not rely on them in reaching our decision.

[25] Those events included: (1) in January 2013, Hallmark consented to findings that it failed to establish a reasonable supervisory system and procedures for retaining and reviewing email; (2) the Indiana consent agreement referenced above involved allegations that Hallmark and Toland's proposed supervisor failed to adequately supervise an individual at the firm; and (3) in 2009, FINRA cited Hallmark for failing to ensure that Toland and the firm's owner did not engage in activities requiring registration while they were suspended, and the explanations provided by the firm regarding the use of Toland's and Hallmark's owner's registered representative codes while they were suspended raised additional questions and concerns for FINRA. In addition, the NAC cited the Commission's "2012 examination report f[inding] that

(continued…)

Third, the NAC concluded that Hallmark "ha[d] not demonstrated that it could properly supervise a statutorily disqualified individual such as Toland," in that, among other things, Toland's proposed supervisors were "highly problematic." Because Toland's proposed supervisor already supervised fifteen individuals and served as chief compliance officer, the NAC was concerned that he lacked sufficient time to supervise Toland. In addition, the supervisor was named in an Indiana securities regulatory enforcement action for failure to supervise, which was resolved by consent agreement imposing restitution and a civil penalty, and the firm's regulatory and disclosure issues discussed above occurred under his watch.[26] The NAC also concluded that Toland's proposed backup supervisor was not qualified because he only recently became licensed as a principal, had re-entered the securities industry after a more than ten-year absence, and had no supervisory experience.[27]

G. The NAC found that the Hearing Panel did not abuse its discretion by denying Toland's request to postpone the hearing.

In denying Hallmark's application, the NAC also found that the Hearing Panel did not abuse its discretion by denying Toland's request to postpone the hearing. The NAC relied on (1) the pendency of Hallmark's application since December 2009 (nearly four years before the October 2013 hearing), (2) the initial scheduling of the hearing for November 2011 (nearly two years before the eventual hearing), (3) the previous adjournments, (4) the postponement of the agreed August 15, 2013 hearing date at Toland's request over Member Regulation's objection, and (5) the Hearing Panel's willingness to move the hearing to New York to accommodate Toland and its subsequent decision to hold it telephonically. Given these facts, as well as the serious (undisputed) allegations of intervening and continuing misconduct by Toland and his continued employment in the securities industry pending resolution of Hallmark's application, the NAC found that the Hearing Panel properly denied Toland's request to postpone the October 17, 2013 hearing.[28]

(…continued)
the Firm failed to establish [written supervisory procedures] related to reviewing customer accounts that receive penny stock and representatives['] use of email," and also finding "evidence of excessive trading and unsuitable recommendations in two of Toland's customer accounts."

[26] *See supra* notes 24 and 25 and accompanying text.

[27] The NAC also found Hallmark's proposed supervisory plan deficient for additional reasons. But because it found that there were serious issues with Toland's intervening misconduct, Hallmark's regulatory history, and Toland's proposed supervisors, the NAC determined it was unnecessary to allow Hallmark to amend the plan to cure its deficiencies, as the NAC would have done had it otherwise been inclined to approve the application.

[28] Toland later requested we stay the NAC's decision and allow him to continue to associate with Hallmark pending our consideration of his application for review. We denied his request. *Mitchell T. Toland*, Exchange Act Release No. 71875, 2014 WL 1338145, at *3 (Apr. 4, 2014).

II. Analysis

A. The standard of review for Toland's application is established by Exchange Act Section 19(f).

Toland challenges FINRA's denial of Hallmark's membership continuance application pursuant to Exchange Act Section 19(d).[29] Exchange Act Section 19(f) requires us to dismiss this proceeding if each of the following requirements is satisfied: (1) "the specific grounds on which [the] denial . . . is based exist in fact," (2) the denial "is in accordance with the rules of the self-regulatory organization," *i.e.*, FINRA, and (3) "such rules are, and were applied in a manner, consistent with the purposes of" the Exchange Act.[30] Because we find that each of these requirements is satisfied, we accordingly dismiss this proceeding.[31]

B. The specific grounds on which FINRA denied Hallmark's membership continuance application exist in fact.

We find that the specific grounds on which FINRA based its denial of Hallmark's membership continuance application, as summarized above, exist in fact. Indeed, Toland does not dispute that this element is satisfied. We conclude that the record supports the NAC's factual findings.[32]

C. FINRA's denial of Hallmark's application was consistent with FINRA rules.

We also find that FINRA's denial of Hallmark's application was in accordance with FINRA rules.[33] "In a FINRA proceeding such as this, 'the burden rests on the applicant to show that, despite the disqualification, it is in the public interest to permit the requested

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29 15 U.S.C. § 78s(d).

30 *Id.* § 78s(f).

31 Toland does not argue, nor do we find, that FINRA's denial of Hallmark's application imposes any burden on competition of the sort prohibited by Exchange Act Section 19(f). *See Pedregon*, 2010 WL 1143089, at *8 n.35 (concluding that denial of membership continuance application "imposed no undue burden on competition").

32 In assessing the first element, we look to the record before the NAC. We address below Toland's assertion that he would have presented additional evidence had the hearing been postponed. *See* Section II.D.2.

33 FINRA's By-Laws provide that it may grant a membership continuance application if, "in its discretion," FINRA determines that approval is "consistent with the public interest and the protection of investors." FINRA By-Laws, Art. III, § 3(d); *accord William J. Haberman*, Exchange Act Release No. 40673, 53 SEC 1024, 1998 WL 786945, at *2 n.7 (Nov. 12, 1998) ("NASD may, in its discretion, approve association with a statutorily disqualified person only if the NASD determines that such approval is consistent with the public interest and the protection of investors."), *aff'd*, 205 F.3d 1345 (8th Cir. 2000) (Table).

employment.'"[34] Toland does not assert that Hallmark met this burden, or even that his firm could have done so had Toland and Hallmark participated in the hearing, and he raises no procedural challenge under FINRA rules.[35] We find that FINRA complied with its substantive and procedural rules in denying Hallmark's application.

D. FINRA applied its rules in a manner consistent with the Exchange Act.

We also find that FINRA applied its rules in a manner consistent with the Exchange Act.[36] Toland does not dispute the validity of the NAC's substantive conclusions based on the record before it. Instead, he limits his argument to the single procedural claim that the Hearing Panel should have postponed the October 17, 2013 hearing.

1. The NAC's substantive findings are consistent with the Exchange Act.

We first address the NAC's substantive findings. The NAC appropriately concluded, and cogently explained the basis for its determination, that Toland's continued association with Hallmark would present an unreasonable risk of harm to the market and investors.[37] Among other things, we agree with the NAC's determination that "[r]egardless of the serious nature of Toland's original misconduct, his subsequent and repeated failures to disclose numerous outstanding liens and judgments during a four-year period are, on their own, sufficiently

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[34] *Emerson*, 2009 WL 2138439, at *4 (quoting *Gershon Tannenbaum*, Exchange Act Release No. 31080, 50 SEC 1138, 1992 WL 213844, at *2 (Aug. 24, 1992)).

[35] Although Toland faults the Hearing Panel for declining to postpone the hearing, he asserts that FINRA's determination violated the Exchange Act, not its own procedure. *See* FINRA Rule 9524(a)(5) (providing that Hearing Panel "*may* postpone or adjourn any hearing" (emphasis added)). We reject Toland's argument for the reasons set forth in Section II.D.2.

[36] Toland does not assert that those rules, to the extent applied here, are inconsistent with the Exchange Act, nor do we so find.

[37] The Exchange Act provides that FINRA may "bar from becoming associated with a member any person, who is subject to a statutory disqualification." Exchange Act Section 15A(g)(2), 15 U.S.C. § 78o-3(g)(2). For FINRA's denial of a membership continuance application to be consistent with the Exchange Act, "FINRA must 'independently [evaluate the] application, based upon the totality of the circumstances, and . . . explain the bases for its conclusion.'" *Pedregon*, 2010 WL 1143089, at *5 (quoting *Frank Kufrovich*, Exchange Act Release No. 4543, 55 SEC 616, 2002 WL 215446, at *5 (Feb. 13, 2002)). We "have afforded FINRA discretion in determining whether persons subject to statutory disqualification should be permitted to associate with a member firm." *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 WL 3554584, at *13 (Sept. 13, 2010) (citations omitted).

egregious to warrant denial" of Hallmark's application.[38] The NAC's finding is consistent with our recognition of the critical importance of an associated person's accurate disclosure on his Form U4,[39] and the material risks that such inaccurate disclosure conceals.[40] We also agree that Hallmark "has a troubling history of failing to comply with FINRA's reporting and disclosure obligations," which supports the conclusion that the firm is "not capable of assuming the additional heavy burden of supervising a statutorily disqualified individual such as Toland." And we share the NAC's concern that Toland's proposed supervisors are "highly problematic"[41] given, among other things, the primary supervisor's current supervision of fifteen other individuals and additional duties as chief compliance officer,[42] the regulatory difficulties that Hallmark experienced during the proposed supervisor's tenure, and the proposed backup supervisor's inexperience.[43]

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[38] Toland's misconduct was all the more troubling given his previous failure to disclose his 2005 bankruptcy on his Form U4 and associated expressions of remorse. Although the NAC did not rely on the original misconduct as a part of a pattern, it would have been justified in doing so. *See Morton Kantrowitz*, Exchange Act Release No. 54278, 2006 WL 2252394, at *5 (Aug. 7, 2006) (concluding that two incidents "demonstrate[d] a sufficient pattern of misconduct to make consideration of the earlier statutorily disqualifying event appropriate").

[39] *Rosario R. Ruggiero*, Exchange Act Release No. 37070, 52 SEC 725, 1996 WL 164175, at *3 (Apr. 5, 1996) (emphasizing that "[t]he candor and forthrightness of [individuals making these filings] is critical to the effectiveness of [SRO] screening process" (quoting *Alton*, 1995 WL 464801, at *2 (alteration in original))).

[40] A representative's serious undisclosed financial problems raise concerns about whether he can "responsibly manage his own financial affairs, and ultimately cast doubt on his ability to provide trustworthy financial advice and services to investors relying on him to act on their behalf as a securities industry professional." *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *9 (Nov. 9, 2012), *appeal dismissed*, No. 13-31 (2d Cir. Sept. 24, 2013).

[41] "[I]n determining whether to permit the employment of a statutorily disqualified person, the quality of the supervision to be accorded that person is of utmost importance." *Citadel Sec. Corp.*, Exchange Act Release No. 49666, 57 SEC 502, 2004 WL 1027581, at *4 (May 7, 2004) (internal quotation omitted). For this reason, "[w]e have made it clear that such persons must be subject to stringent oversight by supervisors who are fully qualified to implement the necessary controls." *Id.*; *see also Haberman*, 1998 WL 786945, at *4 (recognizing the necessity of "stringent supervision for a person subject to a statutory disqualification").

[42] *Emerson*, 2009 WL 2138439, at *5 (finding that FINRA "reasonably questioned whether [proposed supervisor] ha[d] sufficient time to devote to the heightened supervision of a statutorily disqualified individual given that [he] supervised nine other people" (internal quotation and brackets omitted)).

[43] *Pedregon*, 2010 WL 1143089, at *6 (finding assignment of unqualified backup supervisor to be "troubling"); *see also Emerson*, 2009 WL 2138439, at *5 (stating that the Commission was "concerned" with adequacy of supervisory plan given, among other things, proposed supervisor's "lack of experience supervising statutorily disqualified persons").

2. Toland's procedural argument is meritless.

As noted above, Toland's sole argument is that the Hearing Panel abused the "broad discretion" afforded it "in determining whether to grant a request for a continuance,"[44] and thus violated the Exchange Act by denying Toland a sufficient "opportunity to defend against" FINRA's case pursuant to a "fair procedure."[45] In particular, Toland asserts that "[g]iven the extremely critical circumstances," regarding his mother's health, "it was impossible" for him to attend the October 17, 2013 hearing. Even assuming that the Exchange Act provisions on which Toland relies apply to non-disciplinary proceedings such as this one,[46] we find that Toland's argument is meritless.

Although we sympathize with Toland's personal situation, we find that FINRA acted within the scope of its discretion in denying his request to postpone the hearing. To alleviate the need for Toland to travel, FINRA moved what it expected would be a relatively brief afternoon hearing to New York from Washington, D.C.[47] When Toland asserted he could not appear in

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[44] *See Robert J. Prager*, Exchange Act Release No. 51974, 58 SEC 634, 2005 WL 1584983, at *13 (Jul. 6, 2005) ("In NASD proceedings, the trier of fact has broad discretion in determining whether to grant a request for a continuance."); *Falcon Trading Grp., Ltd.*, Exchange Act Release No. 36619, 52 SEC 554, 1995 WL 757798, at *5 (Dec. 21, 1995) ("It is well settled that in NASD proceedings, as in judicial proceedings, the trier of fact has broad discretion in determining whether a request for continuance should be granted, based upon the particular facts and circumstances presented."), *petition denied*, 102 F.3d 579 (D.C. Cir. 1996). Toland's attempt to distinguish these cases on their facts is misguided. In exercising its broad discretion, FINRA need not establish that the circumstances relevant to its determination are identical to those in prior cases involving either itself or its predecessor, NASD.

[45] Toland cites Exchange Act provisions applying to SRO disciplinary proceedings. *See* Exchange Act Section 15A(h)(1), 15 U.S.C. § 78-o3(h)(1) (generally requiring that "[i]n any proceeding by a registered securities association," such as FINRA, "to determine whether a member or person associated with a member should be *disciplined* . . . the association shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record" (emphasis added)); Exchange Act Section 15A(b)(8), 15 U.S.C. § 78o-3(b)(8) (requiring that the rules of registered securities associations must, among other things, "provide a fair procedure for the *disciplining* of members and persons associated with members" (emphasis added)).

[46] The NAC's decision to deny Hallmark's application is not a decision to discipline Toland. *Halpert & Co.*, Exchange Act Release No. 28615, 50 SEC 420, 1990 WL 322213, at *2 (Nov. 14, 1990) (noting that NASD's denial of membership was not "imposing a penalty on applicants in this matter or even a remedial sanction"); *see also id.* at *2 n.8 ("Under the Commission's rules, the NASD's action [to deny a membership continuance application] is not treated as a disciplinary proceeding." (citations omitted)).

[47] FINRA expected the hearing to last approximately two and a half hours, of which Toland would have needed to be present for only one hour. Toland offers no basis to dispute this time estimate. Hallmark never submitted a witness or exhibit list or estimated the amount of time it might need to present its evidence.

person, FINRA scheduled a telephonic hearing. Toland makes no attempt to explain why he could not have appeared telephonically, and he also fails to explain why no Hallmark witnesses or representatives (including the attorney representing both Toland and the firm) attended the hearing, given that only Toland asserted he was unavailable. Further, despite the long pendency of the application, Toland never proposed an alternative date for the hearing, but rather simply asserted that he was unavailable for at least eight to ten weeks.[48] Under these circumstances, we find it was reasonable for FINRA to proceed with the hearing as scheduled.[49]

We also reject Toland's assertion that because the requested adjournment of the hearing "would not have presented an imminent risk of unreasonable . . . harm to investors," FINRA's decision to deny that postponement was "patently unfair." Toland ignores the relevant standard. The question is not whether granting the requested postponement would have presented an "imminent risk," but rather whether FINRA's decision to deny Toland's request was within the broad scope of its discretion.[50] For the reasons set forth above, we conclude that FINRA acted within the scope of that discretion.

We also find no merit in the specific assertions underlying Toland's argument. First, Toland asserts that the amount of time the FINRA proceedings had already taken at the time of the hearing demonstrates that a postponement posed no undue risk and blames FINRA's "foot dragging" for the scheduling delay. But it was Hallmark that requested a postponement of the initial hearing date (albeit an unopposed request), and Toland obtained a second postponement over Member Regulation's objection. Even if we were to accept Toland's attempt to attribute the delay "predominantly" to FINRA, we would find it beside the point. Just because one party obtains a continuance does not mean that the opposing party is automatically entitled to one

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[48] Toland asserts that the NAC erred by concluding that he was seeking an eighteen-week postponement, rather than asserting his unavailability for eight to ten weeks. Under either circumstance, the NAC was justified in denying Toland's motion.

[49] *See Whiteside & Co.*, Exchange Act Release No. 26187, 49 SEC 963, 1988 WL 901551, at *4 (Oct. 14, 1988) (rejecting argument that "NASD was required to grant a postponement because [firm's chairman] was seriously ill and Whiteside, the firm's only other principal, could not leave the firm unattended" because "[t]he law does not require unlimited postponements of judicial proceedings" and concluding that "the NASD was not required to postpone this matter for a third time until some indefinite date in the future"), *aff'd*, 883 F.2d 7 (5th Cir. 1989); *cf. Harold B. Hayes*, Exchange Act Release No. 34662, 51 SEC 1294, 1994 WL 512480, at *7 (Sept. 13, 1994) (finding it was appropriate for NASD to deny continuance in disciplinary proceeding notwithstanding applicant's claim that his "reactive depression" rendered him unable to assist in his defense and manifested itself in "lack of concentration, memory loss, and severe stress, and was complicated by the side effects of the drug treatment he was undergoing").

[50] *See supra* note 44; *see also Falcon Trading Group*, 1995 WL 757798, at *5 (holding that our "inquiry is limited to determining whether the denial constituted 'an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay'" (quoting *Richard W. Suter*, 47 SEC 951, 963 (1983))).

later.[51] Toland also benefitted from the scheduling delays, during which he continued to work, because they allowed Hallmark time to search for qualified supervisors for him. In any event, regardless of the origin of the delay, FINRA had good reason to insist on expedience after it learned in early 2013 that Toland had again failed to make proper disclosure on his Form U4.

Second, we also reject Toland's claim that his "disciplinary history with respect to customer complaints" shows that postponement would have posed no risk. Even accepting Toland's efforts to minimize the significance of five prior customer complaints based on their age,[52] we remain troubled by Toland's uncontested failure to disclose numerous judgments and liens on his Form U4.[53]

Finally, we reject Toland's argument that the NAC's decision was "unfairly skewed" because, given the scheduling of the hearing, he could not present evidence of various "substantive and potentially mitigating factors." Because we have concluded that FINRA acted within the scope of its discretion when it denied Toland's postponement request, we need not consider his argument. But even if Toland had offered the testimony he now proffers, it would not undermine the factual basis on which the NAC relied in denying his firm's application.

First, Toland asserts that he would have presented the following potentially mitigating factors at a hearing: (1) his father's death in 2011 after a lengthy battle with Alzheimer's and dementia and its emotional and financial effects, (2) his son's receipt of intensive therapy for the last ten years as a result of various disabilities, and (3) his separation and divorce from his spouse. Although these factors may explain why Toland was in financial distress, they do not justify his failure to disclose the liens and judgments, establish that Toland's misconduct will not recur, or demonstrate that he presents no risk of future harm to investors.[54] And none of them relates to the sufficiency of Hallmark's supervision of Toland or its regulatory history.

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51 *Cf. Thomas J. Fittin, Jr.*, Exchange Act Release No. 29173, 50 SEC 544, 1991 WL 292516, at *5 (May 8, 1991) (declining to find abuse of discretion in law judge's denial of respondent's postponement request where "hearings had already been postponed due to deaths in the families of the law judge and staff counsel").

52 *Cf. Emerson*, 2009 WL 2138439, at *5 ("Even where prior misconduct is not recent, it still 'reflects poorly on [an applicant's] judgment and trustworthiness.'" (quoting *Kufrovich*, 2002 WL 215446, at *6)).

53 *See supra* notes 39 and 40 and accompanying text.

54 *See Bernard D. Gorniak*, Exchange Act Release No. 35996, 52 SEC 371, 1995 WL 442063, at *2 (July 20, 1995) (noting that the securities business "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants" (quoting *Richard D. Earl*, Exchange Act Release No. 22535, 48 SEC 334, 1985 WL 548312, at *2 (Oct. 16, 1985), *aff'd*, 798 F.2d 472 (9th Cir. 1986))); *Mayer A. Amsel*, Exchange Act Release No. 37092, 52 SEC 761, 1996 WL 169430, at *6 (Apr. 10, 1996) (stating that the securities industry is "a business that is rife with opportunities for abuse").

Second, we reject Toland's assertion that FINRA "improperly described the Firm's disciplinary and regulatory conduct as 'disconcerting,'" because, at the time of the hearing, Hallmark had "recently gone through an exhaustive 8-month Cycle Examination," which, Toland asserts, it completed "with flying colors."[55] Purported evidence of Hallmark's current compliance with its obligations does not negate the prior disciplinary and regulatory history that the NAC found disconcerting,[56] or the serious issues regarding the firm's proposed supervision of Toland.[57] And the NAC also found that Toland's post-disqualification misconduct standing alone was a sufficient basis to deny his application. In sum, FINRA acted within its discretion when it denied the postponement request, but even if FINRA had granted the request, Toland does not offer a sufficient basis to conclude that FINRA reasonably would have come to an alternative conclusion on his application.

Accordingly, for all these reasons, we dismiss this review proceeding. An appropriate order will issue.[58]

By the Commission (Chair WHITE and Commissioners AGUILAR, STEIN, and PIWOWAR); Commissioner GALLAGHER not participating.

Brent J. Fields
Secretary

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[55] This assertion appears inaccurate given that Toland concedes that Hallmark was "directed to take certain corrective actions" as a result of the examination.

[56] *Cf. Kent M. Houston*, Exchange Act Release No. 71589A, 2014 WL 936398, at *78 (Feb. 20, 2014) ("FINRA has repeatedly held that a lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional." (citing *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 (Nov. 8, 2006)).

[57] *See supra* notes 41-43 and accompanying text.

[58] We have considered all the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 73664 / November 21, 2014

Admin. Proc. File No. 3-15794

In the Matter of the Application of

MITCHELL T. TOLAND
c/o Brad S. Maistrow, Esq.
17 Battery Place, Suite 711
New York, NY 10004

For Review of Action Taken by

FINRA

ORDER DISMISSING REVIEW PROCEEDING

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by Mitchell T. Toland be, and it hereby is, dismissed.

By the Commission.

Brent J. Fields
Secretary